DANAU SURIA MINING SDN BHD

v.

YAM TENGKU ZAITON IBNI AL MARHUM SULTAN ABU BAKAR

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ARIFF YUSOF J
[ORIGINATING SUMMONS NO: D-22-NCC(3)-80-2010]
19 JULY 2010

CIVIL PROCEDURE: *Contempt of court - Committal proceedings - Plaintiff alleging defendant breached interlocutory injunction order - Plaintiff's failure to serve ex parte order for leave for contempt - Whether a fatal non-compliance of procedural requirement - Burden proving contempt beyond reasonable doubt - Whether discharged - Interlocutory injunction order reversed on appeal - Whether application for committal without merit - Rules of the High Court 1980, O. 52*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Injunction restraining defendant landowner from entering land - Defendant suspected plaintiff of conducting illegal mining activities and appointed agents to monitor activities - Defendant's right to check on activities - Appointed agents - Whether in breach of order*

This was the plaintiff's action for committal proceedings against two alleged contemnors appointed by the defendant to monitor the plaintiff's mining activities conducted on her land. The plaintiff claimed that the two contemnors with several other people had entered into the mining land without permission in addition to obstructing and interfering with an alleged exclusive and normal running of the plaintiff's mining activities. The plaintiff's action was based upon an interlocutory injunction granted by the High Court that prevented the defendant's entry into the said land for a limited period of time, *ie*, from 2 April 2010 to 10 May 2010. However, on 10 May 2010, the Court of Appeal, upon hearing the appeal filed by the defendant against the High Court order, granted an injunctive order that prevented the plaintiff from conducting mining activities or any other activities on the said land. Further to that order, the Court of Appeal allowed the defendant's appeal and reversed the order of the High Court in which this contempt proceeding was instituted upon.

Held (dismissing the plaintiff's application with costs):

(1) The application was without sufficient merit as its foundation was on the interlocutory injunction order that was reversed on appeal. Generally, it would be in the best interests of the parties to proceed expeditiously the matter by adjudicating it at trial instead of engaging in interlocutory applications. (paras 5 & 6)

(2) The plaintiff should be ordered to pay costs of RM10,000 to each of the two alleged contemnors. The higher costs were ordered to reflect the court's displeasure at the plaintiff's application that verged on abuse of the court's process. The plaintiff's application lacked substance and was an affront to logic and common sense to suppose that the alleged contemnors and the other persons which included some police personnel could have interfered with or prevented the mining operations on the land. (paras 5 & 8)

(3) There had been non-disclosure of material facts on the part of the plaintiff. The plaintiff failed to inform the court about the correspondence from the defendant's solicitors to the plaintiff's solicitors informing them in advance on the intention to appoint agents to monitor activities on the mining land. The defendant suspected illegal mining activities were being conducted on the land, and as owner of the mining land, she would have been entitled to enter it for purposes of checking on those activities. Such a right was also not inconsistent with the agreement between the parties. (paras 5 & 9)

(4) There had been a fatal non-compliance with procedural requirements. There was no record to establish that the *ex parte* order for leave was personally served either on the defendant or on her solicitors. It was necessary for the alleged contemnor to know for certain the fact that an *ex parte* leave had been granted and the terms on which it had been granted. If the *ex parte* leave were not served together with other documents *ie*, the notice of motion and affidavit in support required under O. 52 Rules of the High Court 1980, the alleged contemnor would necessarily be prejudiced and handicapped in answering the alleged contempt. As committal proceeding is a criminal or quasi criminal proceeding, there

should be strict compliance with applicable rules and procedures. The burden of proof beyond reasonable doubt is on both as to the rules and procedures and as to the guilt alleged *Sivalingam S Ponniah & Ors v. Balakrishnan S Ponniah & Ors.* (foll). (paras 5 & 9)

(5) The burden on the plaintiff to establish contempt beyond reasonable doubt had not been discharged. There must be clear proof that the terms of the order have been broken and the breach must be proved beyond all reasonable doubt *Tiu Shi Kian & Anor v. Red Rose Restaurant Sdn Bhd* (foll); and *IJM Corporation Bhd v. Harta Kumpulan Sdn Bhd.* (foll). (para 4)

Case(s) referred to:

IJM Corporation Bhd v. Harta Kumpulan Sdn Bhd (No 2) [2008] 8 CLJ 308 HC ***(foll)***

Sivalingam S Ponniah & Ors v. Balakrishnan S Ponniah & Ors [2003] 6 CLJ 412 HC ***(foll)***

Tiu Shi Kian & Anor v. Red Rose Restaurant Sdn Bhd [1984] 1 CLJ 325; [1984] 2 CLJ (Rep) 543 HC ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 52 rr. 1, 3

For the plaintiff - Annon Xavier (Brendan Phang with him); M/s Lee Swee Seng & Co

For the defendant - Jason Chan; M/s Soraya Chuah & Assocs

Reported by Melanie Murthy

JUDGMENT

Mohd Ariff Yusof J:

[1] The plaintiff in this action has commenced committal proceedings against two alleged Contemnors who are respectively one Abdelali Boumidi and Chin Chee Chen. The First Contemnor, Boumidi, is the husband of the Defendant in this action. Chin, the Second Contemnor, is a friend of Boumidi who was asked to assist him in the events that transpired which led to the present allegation of contempt.

[2] The alleged contempt is in respect of an order of the High Court given on 2 April 2010, but, as counsel for the plaintiff/applicant was quick to point out at the outset, it is nevertheless limited to the period between 2 April 2010 and 10 May 2010. The date, 10 May 2010, is important because on that date the Court of Appeal, upon hearing the appeal filed by the defendant, granted an interim injunctive order that prevented the plaintiff as respondent from conducting mining activities or any other activities on that parcel of land identified as No. 4257, Sungai Ganoh, Mukim Keratong, Daerah Rompin, Pahang. Further to that interim injunctive order, the Court of Appeal has on 23 June 2010 allowed the defendant's appeal and reversed the order of the High Court dated 2 April 2010, namely the very same order on which the contempt proceeding is now founded. The Court of Appeal has now preserved the *status quo* between the parties to the present dispute.

[3] For completeness, I highlight the relevant parts of the Court of Appeal Order dated 23 June 2010:

> (b) Keputusan Mahkamah Tinggi bertarikh 2.4.2010 diketepikan;
>
> (c) Sementara penyelesaian perbicaraan penuh guaman ini di Mahkamah Tinggi:
>
> (i) Perayu tidak dibenarkan memasuki sebarang perjanjian berkenaan tanah yang dipegang melalui (the said land) ...
>
> (ii) Responden tidak dibenarkan untuk memasuki Parsel tersebut untuk menjalankan sebarang kerja; ...

[4] As things now stand, the *status quo* between the parties is maintained whereby the defendant as appellant is prevented from entering into any other agreement over the said parcel of mining land, whilst the plaintiff as respondent is prevented from entering that parcel of land to undertake any work thereon. To this extent the substance of the present contempt proceeding is historic in nature, its foundation being the entering into the mining parcel without permission and obstructing and interfering with an alleged exclusive and normal running of the plaintiff's mining activities between the period 2 April 2010 and 10 May 2010. To quote plaintiff's counsel, the contemptuous conducts are:

As against Boumidi, (i) "entering the mining parcel without permission and obstructed and interfered with the exclusive and normal running of the Plaintiff's mining activities between 2.4.2010 and 10.5.2010; and (ii) leading a group of unauthorised persons (including the Second Contemnor, Chin Chee Chen) into the said mining parcel with false reasons of surveying the boundaries, and allowed Chin to take away a bag of iron ore as samples for some ulterior purposes of which only the alleged contempt would know."

As against Chin, (i) purposely entering into the said mining land knowing clearly there was a court order dated 2.4.2010 restraining the Defendant's agents and/or servants to do so; (ii) stating in evidence that the court order dated 2.4.2010 is "useless against him"; (iii) taking away a bag of iron ore without permission and valid reasons; and (iv) verbally abusing a worker while he was at the mining site.

[5] I have given the fullest consideration to the various testimonies of not only the Contemnors but also the three witnesses called for the plaintiff. I have observed their demeanour and responses during cross-examination, always bearing in mind the very strict requirements of the law in regard to contempt proceedings. On the law and on the evidence presented before me, I am of the view that the only proper order to make in this instant proceeding is to dismiss this present application on the following grounds:

1. There has been a fatal non-compliance with procedural requirements.

2. The burden on the plaintiff/applicant being to establish contempt beyond reasonable doubt, this burden has not been discharged.

3. There has been non-disclosure of material facts on the part of the plaintiff/applicant in this application for leave to commit the present alleged Contemnors for contempt of the court order.

4. This application is on the whole without sufficient merit especially in the light of the Court of Appeal Order which has reversed the order which is the foundation of this present contempt proceeding, and generally it would be in the best interests of the parties to proceed expeditiously to have this matter adjudicated at trial instead of engaging in needless interlocutory applications such as the present.

[6] Given the circumstances, I feel it appropriate for the costs of RM10,000 to be ordered to be paid by the plaintiff/applicant to each of the two alleged Contemnors within 14 days from the date of this order. I am ordering costs of this higher level because it is necessary to reflect this court's displeasure at such an application which verges on abuse of the court's process, since it lacks substance and is an affront to logic and common sense to suppose that the alleged Contemnors and the other persons who were brought to the site (and they included some police personnel) could have interfered with or prevented the mining operations on the land. Despite some initial hesitancy, the testimonies of the plaintiff's witnesses eventually confirmed that there were more than 50 workers working on-site at that time. How could these few persons accompanying the alleged Contemnors, and the alleged Contemnors themselves, be in a position to interfere or prevent?

[7] The reasons why the alleged Contemnor Boumidi, who subsequently also brought along Chin, entered that parcel of land are sufficiently explained in Boumidi's Affidavit (encl. 39) paras. 6 to 30. To quote the relevant parts of para. 29 and para. 30:

> I was there together with a surveyor and the two agents the whole time and this never happened! We were not there to pick a fight like common gangsters or thugs, bearing in mind the station and position of my wife. Besides, the Plaintiff had at least 50 workers on site during the mining work, how can we try to physically interfere or stop the mining activities of the Plaintiff? It would have been futile and in fact we ourselves were concerned about our physical safety!
>
> I reiterate that we had fully respected and obeyed the order of this court on 2.4.2010 and had sought recourse against it by way of a proper channel through an appeal to the Court of Appeal which has since been allowed.

[8] Further, an applicant who institutes contempt proceeding must come to court with clean hands and effect full disclosure of material facts, since the application from leave is necessarily made *ex parte*. The applicant here has failed to inform the court about the correspondence from the defendant's solicitors to the plaintiff's solicitors informing the latter in advance on the intention to appoint agents to monitor the plaintiff's activities on the mining land. The defendant had suspected illegal mining activities being

conducted on the land, and as owner of the mining land, she would have been entitled to enter it for purposes of checking these activities. Such a right is not inconsistent with the agreement between the parties in any event. A

[9] As for strict compliance with the rules of procedure relating to contempt proceedings, I fail to see anything in the record before me to establish that the *ex parte* order to leave was personally served either on the defendant or on her solicitors. In this respect I am in full agreement with the decision of the High Court in *Sivalingam S. Ponniah & Ors v. Balakrishnan S. Ponniah & Ors* [2003] 6 CLJ 412, where Zulkifli J (as his Lordship then was) read the requirements of O. 52 rr. 1 and 3 as imposing a duty on an applicant to serve the *ex parte* order for leave as well. The logic and rationale behind this role is apparent. It is necessary for the alleged Contemnor to know for certain the fact that an *ex parte* leave has been granted, and the terms on which it has been granted. If the *ex parte* leave is not served together with the other documents required under O. 52 (the notice of motion and the affidavit in support), he will necessarily be prejudiced and handicapped in answering the alleged contempt. In any event Form 110 (Order of Committal) makes an express reference to "service on the defendant ... of a copy of the order of the court dated ... and of notice of this motion." B C D E

This case, and numerous others, have consistently stressed that a committal proceeding is a criminal or quasi criminal proceeding. In this regard there has to be strict compliance with applicable rules of procedure. As stated in *Sivalingam*, "the burden of proof is proof beyond reasonable doubt and this burden is on the ... plaintiff, both as to the rules and procedures and as to the guilt alleged." Failure by the applicant to prove either of these requirements is fatal to the application. In relation to a contempt proceeding based on a breach or defiance of a court order, there must be clear proof that the terms of the order have been broken and the breach must be proved beyond all reasonable doubt, even though the court is looking at a civil contempt. See eg, *Tiu Shi Kian & Anor v. Red Rose Restaurant Sdn Bhd* [1984] 1 CLJ 325; [1984] 2 CLJ (Rep) 543. See also *IJM Corporation Bhd v. Harta Kumpulan Sdn Bhd (No. 2)* [2008] 8 CLJ 308: F G H I

A It is trite that the standard of proof for civil contempt is no different from that of criminal contempt. Contempt of court being an offence of a criminal nature requires proof beyond reasonable doubt ... (per Syed Ahmad Helmy J as his Lordship then was, at page 332).

B **[10]** I wholeheartedly incorporate and apply these propositions of law to the facts of this present application.

[11] Enclosure 28A (notice of motion) is hereby dismissed with costs of RM10,000 to be paid by the plaintiff to each of the C alleged Contemnors within 14 days from the date of this order.

D

E

F

G

H

I